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No. 91-948

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

*Petitioners,*

vs.

CITY OF HIALEAH,

*Respondent.*

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## ARGUMENT

### I. The City's Argument Confirms that Important Issues Are Raised Regarding the Meaning of *Employment Division v. Smith*.

This case turns on the meaning of this Court's momentous decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The parties and the courts below fundamentally disagree over the meaning of that opinion. What are the neutral and generally applicable laws that can be applied to religious exercise? What is the meaning of the compelling interest test that applies to laws that are not neutral and generally applicable?

**A. Neutral and Generally Applicable.** The City claims that the ordinances in this case are neutral and generally applicable. Petitioners think it almost self-evident that they are not. The central disagreement does not concern the scope of the ordinances. Rather, the disagreement is over the meaning of the Court's new constitutional standard.

The City agrees that Santeria is a religion, Br. Opp. 3, that animal sacrifice is part of that religion, *id.* at 4, and that the ordinances were intended to stop animal sacrifice, *id.* at 7.

The City agrees that both the City and State permit the killing of animals for food, hunting, fishing, trapping, extermination, and euthanasia. *Id.* at 9. It does not dispute Petitioners' listing of other permitted reasons. Pet. 10. These lists would seem to exhaust the significant secular reasons for killing animals. The question presented is whether ordinances are neutral and generally applicable when they forbid one reason for killing animals and permit all other reasons for killing animals. May a city enact ordinances that are carefully drafted to suppress a religious practice without inconveniencing any significant secular



practice, and then defend those ordinances as neutral and generally applicable under *Smith*? In short, what is a "neutral and generally applicable law"?

The City's reading of *Smith* is most clearly revealed at page 9 of its Brief in Opposition. In the first full paragraph on that page, the City explicitly claims the power to single out religion for special prohibition. It concedes that it accepts most secular reasons for killing animals, and then it says: "Petitioners illogically conclude that the City also must classify religion as an acceptable reason." Br. Opp. 9. This "illogical" conclusion is the absolutely minimum content of the Free Exercise Clause -- that the City cannot "ban such acts or abstentions only when they are engaged in for religious reasons." *Smith*, 494 U.S. at 877.

The City goes on to assert that it can single out religious reasons for killing animals *even if secular and religious killings of animals present the same evils.* Br. Opp. 9. "[T]he City constitutionally does not have to redress all such problems at the same time." *Id.* It cites for this proposition an economic substantive due process case about the regulation of dentists. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).[1] The City claims it can proceed one step at a time even if its first and only step is to suppress a constitutionally protected worship service.

The City's one-step-at-a-time argument turns *Smith* and the First Amendment on their heads. One-step-at-a-time approaches are the antithesis of generally applicable laws. Activity singled out for special constitutional protection is in Hialeah singled out for special prohibition.

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[1] The City also cites a wholly inapplicable passage from *United States v. Lee*, 455 U.S. 252, 259 (1982). *Lee* held that religious objectors could be subjected to generally applicable taxes, because there was a compelling interest in refusing exemption. *Lee* said nothing about singling religion out for special taxation or regulation.

The courts below accepted the City's claim. The district court said, in a part of the opinion adopted by the court of appeals:

> Further, even if the use of the words "ritual" and "ceremony" are understood as targeting primarily religious conduct, nothing in the First Amendment prevents a municipality from specifically regulating such conduct when it is deemed inconsistent with public health and welfare.

App. A40.

The issue is therefore squarely posed. The City and the courts below believe that it is permissible to single out religious practices for special prohibition. Petitioners believe that *Smith* forbids such special prohibitions unless they are justified by a compelling government interest. This Court should grant certiorari to clarify what it meant in *Smith*.

The issue is not eliminated by the City's examples of allegedly secular killings allegedly forbidden by these ordinances. The only such examples offered are cockfighting and voodoo or satanic sacrifices. Br. Opp. 8. Each of these examples is disputed,[2] but these disputes are irrelevant to the issue presented. No resolution of these disputes would make the ordinances generally applicable, so the City's hypotheticals cannot prevent this Court from deciding what it means for ordinances to be generally applicable.

Petitioners claim that these ordinances single out a despised minority religion for special restrictions. The City

[2] The City offered no evidence to show whether voodoo and satanism are religious or secular, and no issue respecting those groups is presented. The ordinances at issue do not appear to forbid cockfighting, because the birds are not killed for food and a cockfight is not easily described as a ritual or ceremony. Cockfighting is illegal in Florida but widespread in Hialeah, and enforcement is sporadic. See R10 at 453-69.



responds that the ordinances might also apply to two other groups who are even more despised and whose religious status is disputed, and to a disreputable recreation that has long been illegal under other laws. This response is no response at all. The logic of *Smith* is that if religious minorities are subject only to generally applicable laws, they will be protected by the political process. Legislatures can impose on religious minorities only those laws they are willing to impose on all their constituents. There is no such guarantee of political protection in a claim that a law applies to two or three small and unpopular minorities instead of one. Such a law is *not* generally applicable.

The City's argument amounts to little more than claiming that it has a reason for suppressing Petitioners' religion. This is apparently what the district court meant when it said that the ordinances' effect on religion "is incidental to the ordinances' secular purpose and effect." Pet. App. A40. But a secular purpose for suppressing religion goes to the compelling interest issue, not to the general applicability issue. Having an alleged reason for a narrowly targeted law does not increase the law's scope or make it generally applicable. If the City claims to have reasons for a narrowly-targeted suppression of religion, those reasons are subject to judicial review under *Smith*'s compelling interest standard. The City is attempting to escape that review by reading all content out of *Smith*'s requirement of neutrality and general applicability. Once again we come to the same conclusion: the Court must grant certiorari to clarify *Smith*.

**B. Compelling Interest.** The City says little about the compelling interest issue, but its one-step-at-a-time argument confirms that that issue and its subparts are squarely presented. Petitioners argue that the City must show a compelling reason for discriminating against religion, and that it cannot rely on compelling interests that it does not pursue in other contexts. The City disagrees, insisting that it can single out

religious conduct even if secular conduct causes the same evils. Br. Opp. 9.

The courts below equated the compelling interest test with the rational basis test; they treated any legitimate state interest as a compelling interest. The City implicitly adopts that position with its one-step-at-a-time argument, drawn directly from the rational basis cases. Br. Opp. 9. Thus, fundamental questions about the meaning of the compelling interest test are also squarely at issue in this case.

## II. The Decision Below Conflicts With This Court's Intervening Decision in the Son of Sam Case.

Subsequent to the petition for certiorari, this Court decided *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991). *Simon & Schuster* strongly supports Petitioners' reading of *Smith*: a law that singles out First Amendment activity for different and hostile treatment can be justified only by a compelling interest in the statutory classification -- not by more general interests that are not generally pursued.

*Simon & Schuster* found compelling interests in compensating crime victims and in depriving criminals of the fruits of their crime. *Id.* at 509-10. But the Court unanimously held these compelling interests irrelevant, because they did nothing to justify New York's distinction between income and assets from publications and income and assets from all other sources. *Id.* at 510. The fatal defect was that "the *distinction* drawn by the Son of Sam law has nothing to do with the State's interest." *Id.* (emphasis added).

There, as here, the law was not generally applicable. There, as here, the law singled out an activity protected by the First Amendment. There, as here, the state relied on general interests that it did not pursue in other contexts. *Simon & Schuster* and the decision below are squarely in



conflict; the only difference is that one case involves speech and the other religious exercise.

Justice Kennedy, concurring, would have gone further. He would abandon the compelling interest test in this context and apply an absolute rule against content discrimination, subject to certain narrowly-defined categorical exceptions. *Id.* at 512-15. Similar reasoning here would lead to an absolute rule prohibiting discrimination against religion. Justice Kennedy's proposal builds from an insight also set forth in the Petition for Certiorari in this case: "it is hard to imagine a compelling need to discriminate against religion." Pet. 17. Justice Kennedy's absolute rule would avoid the temptation to rationalize discrimination against unpopular minorities.

## III. This Case Was Not Previously Decided in a String Cite.

In *Employment Division v. Smith*, this Court cited the opinion below in a string cite of cases illustrating the range of potential conflicts between religious practice and government regulation. 494 U.S. at 889. The City seems to think that this citation represents a decision on the merits. Br. Opp. 11. Such a decision would be without briefing, argument, or a record, without seeing the ordinances, without knowing that the ordinances single out religious practice. Obviously the Court intended no such wholesale disregard of due process and its own rules; to spell out the City's argument is to refute it.

## CONCLUSION

The issues are important, and the City's response confirms that they are squarely presented. The writ of certiorari should be granted.

Respectfully submitted,

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